

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3

4 UNITED STATES OF AMERICA,

No. CR 12-0649 CW

5 Plaintiff,

6 v.

ORDER DENYING  
§ 2255 MOTION

7 DEANDRE SNEAD,

8 Defendant.

9  
10 Movant Deandre Snead, represented by counsel, moves under 28  
11 U.S.C. § 2255 to vacate, set aside or correct his sentence.

12 Respondent has filed an opposition to the motion and Movant has  
13 filed a reply.<sup>1</sup> Having considered all of the papers filed by the  
14 parties and the record in this case, the Court DENIES the motion.

15 BACKGROUND

16 A. Procedural Background

17 On December 10, 2012, Movant plead guilty, without a plea  
18 agreement, to one count of being a felon in possession of a  
19 firearm in violation of 18 U.S.C. § 922(g)(1). Applying United  
20 States Sentencing Guideline (USSG) § 2K2.1(a)(4)(a), the  
21 Presentence Report (PSR) indicated that Movant's base offense

22  
23 <sup>1</sup> The government has filed a motion to stay the proceedings  
24 related to this motion pending the resolution of Beckles v. United  
25 States, Supreme Court Case No. 15-8544, in which the Supreme Court  
will address the applicability of Johnson v. United States, 135 S.  
Ct. 2551 (2015) to the United States Sentencing Guidelines.

26 Movant opposes the motion to stay. As discussed herein, the Court  
27 denies the § 2255 motion regardless of whether Johnson applies  
retroactively to the Sentencing Guidelines. Accordingly, the  
28 motion to stay is DENIED. Docket No. 36.

1 level was 20, because Movant had one prior conviction for a crime  
2 of violence, second degree burglary. Section 2K2.1(a)(4)(a)  
3 relies on the Career Offender Guideline, USSG § 4B1.2, for the  
4 definition of crime of violence. The PSR applied a four-level  
5 enhancement because the offense involved a firearm with an  
6 obliterated serial number and a three-level downward adjustment  
7 for acceptance of responsibility, for a total offense level of 21.  
8 The PSR indicated that Movant should be classified in Criminal  
9 History Category V, resulting in an advisory Guidelines range of  
10 seventy to eighty-seven months. If Movant's sentence had not been  
11 enhanced based on the crime of violence, his total offense level  
12 would have been 15, with a resulting advisory Guidelines range of  
13 thirty-seven to forty-six months.

14 At sentencing, the Court found that Movant's advisory  
15 Guidelines range was seventy to eighty-seven months and sentenced  
16 him to sixty months of imprisonment. Movant did not file a direct  
17 appeal but, on May 31, 2016, after the Supreme Court issued its  
18 decision in Johnson v. United States, 135 S. Ct. 2551 (2015), he  
19 filed the instant § 2255 motion.

20       B. Johnson v. United States

21       In Johnson, the Supreme Court addressed a challenge to the  
22 residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C.  
23 § 924(e), which provides that a defendant with three prior  
24 "violent felony" convictions faces a fifteen-year mandatory-  
25 minimum sentence if convicted of violating 18 U.S.C. § 922(g). 18  
26 U.S.C. § 924(e). The ACCA residual clause definition of "violent  
27 felony," which encompasses any crime that "involves conduct that  
28 presents a serious potential risk of physical injury to another,"

1 is identical to the residual clause of the Guidelines' definition  
2 "crime of violence." The Ninth Circuit makes "no distinction  
3 between the terms 'violent felony' as defined in the ACCA and  
4 'crime of violence' as defined in § 4B1.2(a)(2) of the Sentencing  
5 Guidelines for purposes of interpreting the residual clauses."  
6 United States v. Spencer, 724 F.3d 1133, 1138 (9th Cir. 2013)  
7 (quoting United States v. Crews, 621 F.3d 849, 852 n.4 (9th Cir.  
8 2010) (internal alteration marks omitted)).

9       The Johnson Court held that the residual clause is so vague  
10      that it "both denies fair notice to defendants and invites  
11      arbitrary enforcement by judges." 135 S. Ct. at 2557.  
12      Accordingly, the Johnson Court held that an increase to a  
13      defendant's sentence under the clause "denies due process of law."  
14      In Welch v. United States, 136 S. Ct. 1357 (2016), the Supreme  
15      Court held that Johnson is retroactive as applied to the ACCA.  
16      However, neither the Supreme Court nor the Ninth Circuit has  
17      addressed whether Johnson is retroactive as to the identical  
18      language in the Sentencing Guidelines.

## LEGAL STANDARD

20       A prisoner in custody under sentence of a federal court,  
21 making a collateral attack against the validity of his or her  
22 conviction or sentence, must do so by way of a motion to vacate,  
23 set aside or correct the sentence pursuant to 28 U.S.C. § 2255 in  
24 the court which imposed the sentence. Tripati v. Henman, 843 F.2d  
25 1160, 1162 (9th Cir. 1988). Section 2255 was intended to  
26 alleviate the burden of habeas corpus petitions filed by federal  
27 prisoners in the district of confinement by providing an equally  
28 broad remedy in the more convenient jurisdiction of the sentencing

1 court. United States v. Addonizio, 442 U.S. 178, 185 (1979).  
2 Under 28 U.S.C. § 2255, a federal sentencing court may grant  
3 relief if it concludes that a prisoner in custody was sentenced in  
4 violation of the Constitution or laws of the United States.

5 DISCUSSION

6 The government agrees that Johnson applies to the Sentencing  
7 Guidelines. However, the government argues that Movant  
8 procedurally defaulted his claim under Johnson by failing to file  
9 a direct appeal and that Johnson's application to the Sentencing  
10 Guidelines is not retroactive. Moreover, the government argues  
11 that Movant's prior conviction for second-degree robbery is a  
12 crime of violence, as defined by the Guidelines, even without the  
13 residual clause.

14 I. Procedural Default

15 As a general rule, "claims not raised on direct appeal may not  
16 be raised on collateral review unless the petitioner shows cause  
17 and prejudice." Massaro v. United States, 538 U.S. 500, 504  
18 (2003). In order to overcome this procedural default resulting  
19 from the failure to raise his claims on direct appeal, Movant must  
20 show cause for the default and actual prejudice, or actual  
21 innocence. Sanchez-Llamas v. Oregon, 548 U.S. 331, 350-51 (2006).  
22 A movant shows cause by demonstrating "that the procedural default  
23 is due to an 'objective factor' that is 'external' to the  
24 petitioner and that 'cannot be fairly attributed to him.'"  
25 Manning v. Foster, 224 F.3d 1129, 1133 (9th Cir. 2000) (quoting  
26 Coleman v. Thompson, 501 U.S. 722, 731-32 (1991)).

27 The government argues that "a defendant who failed to raise a  
28 claim on direct appeal must show ineffective assistance of counsel

1 to establish cause." Docket No. 35 at 4. This narrow  
2 interpretation of cause is not supported by case law. Although,  
3 in most cases, a failure to object or failure to file a direct  
4 appeal that is not attributable to ineffective assistance of  
5 counsel is a procedural default, there are circumstances in which  
6 cause may be found. See, e.g., Reed v. Ross, 468 U.S. 1, 13  
7 (1984) ("Underlying the concept of cause, however, is at least the  
8 [] notion that, absent exceptional circumstances, a defendant is  
9 bound by the tactical decisions of competent counsel.") The  
10 Supreme Court has held that cause is found when "the factual or  
11 legal basis for a claim was not reasonably available to counsel"  
12 at the time a direct appeal was or could have been filed. Murray  
13 v. Carrier, 477 U.S. 478, 488 (1986). Accordingly, the failure to  
14 file a direct appeal when the appeal "would have been futile,  
15 because a solid wall of circuit authority" precluded the appeal  
16 does not constitute procedural default. English v. United States,  
17 42 F.3d 473, 479 (9th Cir. 1994) (internal quotation marks and  
18 citations omitted); see also Kimes v. United States, 939 F.2d 776,  
19 778 (1991) ("failure to object . . . is not fatal to [a § 2255]  
20 petition, since well settled law precluded [the] claim at the  
21 time").

22 In Reed, the Supreme Court held that when one of its  
23 decisions explicitly overrules one of its prior decisions or  
24 overturns "a longstanding and widespread practice to which [the  
25 Supreme Court] has not spoken, but which a near unanimous body of  
26 lower court authority has expressly approved" and the new decision  
27 is given retroactive application, there will almost  
28 certainly have been no reasonable basis upon which an attorney previously could have urged a []court to adopt

1 the position that this Court had ultimately adopted.  
2 Consequently, the failure of a defendant's attorney to  
3 have pressed such a claim . . . is sufficiently  
4 excusable to satisfy the cause requirement.

5 Id. at 17 (internal quotation marks omitted). Here, Johnson  
6 expressly overrules prior Supreme Court cases upholding the  
7 analogous residual clause in the ACCA and the Supreme Court has  
8 held that Johnson is retroactive with respect to ACCA claims.  
9 Welch v. United States, 136 S. Ct. 1257 (2016).

10 Moreover, it is indisputable that, at the time Movant could  
11 have filed a direct appeal, a claim that the residual clause in  
12 the § 4B1.2 definition of crime of violence was void for vagueness  
13 would not have succeeded and that "the legal basis for the claim  
14 was not reasonably available to counsel" at that time. Murray,  
15 477 U.S. at 488. Vagueness challenges to the residual clauses in  
16 the ACCA and the Sentencing Guidelines were foreclosed by the  
17 Supreme Court decisions in James v. United States, 550 U.S. 192  
18 (2007), and Sykes v. United States, 131 S. Ct. 2267 (2011).  
19 Accordingly, Movant has demonstrated cause for his procedural  
20 default.

21 As stated above, Movant must also demonstrate prejudice by  
22 showing that the alleged error "worked to his actual and  
23 substantial disadvantage, infecting his entire trial with error of  
24 constitutional dimensions." United States v. Braswell, 501 F.3d  
25 1147, 1150 (9th Cir. 2007) (quoting United States v. Frady, 456  
26 U.S. 152, 170 (1982)). The Supreme Court has not defined the  
27 level of prejudice necessary to overcome procedural default but it  
28 has held that the level is "significantly greater than that  
necessary under the more vague inquiry suggested by the words

1 'plain error.'" Murray, 477 U.S. at 493-94 (quoting Engle v.  
2 Isaac, 456 U.S. 107, 135 (1982)). To show prejudice under the  
3 plain error standard, a defendant must "show her substantial  
4 rights were affected, and to do so, must establish that the  
5 probability of a different result is sufficient to undermine  
6 confidence in the outcome of the proceeding." United States v.  
7 Bonilla-Guizar, 729 F.3d 1179, 1187 (9th Cir. 2013) (internal  
8 quotation marks omitted).

9 The government argues that Movant cannot demonstrate  
10 prejudice because the Sentencing Guidelines are only advisory.  
11 Accordingly, the government notes that this Court "had nearly  
12 unfettered discretion to impose any sentence that Congress made  
13 applicable to his offense." Docket No. 35 at 6. However, even  
14 though the Guidelines are advisory, the Supreme Court has  
15 consistently held that sentencing courts "must treat the  
16 Guidelines as 'the starting point and the initial benchmark.'" Kimbrough v. United States, 552 U.S. 85, 108 (2007) (quoting Gall v. United States, 552 U.S. 38, 49 (2007); see also Peugh v. United States, 133 S. Ct. 2072, 2083 (2013) ("federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines")); Gall, 552 U.S. at 50 n.6 ("district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process."). The Supreme Court recently observed that "when a Guidelines range moves up or down, offenders' sentences move with it." Peugh, 133 S. Ct. at 2084. An improperly calculated Guidelines range would "derail[] the sentencing proceeding before it even began." United States v. Doe, 705 F.3d 1134, 1154 (9th Cir. 2013).

1       Accordingly, the Ninth Circuit has long held that, on direct  
2 review, miscalculation of the Guidelines range constitutes plain  
3 error that affects a defendant's substantial rights. See, e.g.,  
4 id. at 1188 ("We have held that when a sentencing judge  
5 incorrectly calculates the Guidelines range, potentially resulting  
6 in the imposition of a greater sentence, the error affects the  
7 defendant's substantial rights and the fairness of the judicial  
8 proceedings."). Moreover, the Supreme Court recently held that,  
9 absent "unusual circumstances," when a sentencing court improperly  
10 calculates the Guidelines range, the sentence constitutes plain  
11 error, even if the sentence imposed is within the correct  
12 Guidelines range. Molina-Martinez v. United States, 136 S. Ct.  
13 1338, 1347 (2016).

14       Here, this Court considered the enhancement based on the  
15 definition of crime of violence in imposing its sentence. Even  
16 though the sentence of sixty months was a downward variance from  
17 the enhanced range of seventy to eighty-seven months, it was still  
18 well above the non-enhanced range of thirty-seven to forty-six  
19 months. The Court finds that the constitutional error in  
20 calculating Movant's Guidelines range "worked to his actual and  
21 substantial disadvantage." Frady, 456 U.S. at 171 (emphasis in  
22 original).

23       Accordingly, the Court finds that Movant has shown cause and  
24 prejudice sufficient to overcome his failure to file a direct  
25 appeal challenging his sentence.

26       II. Retroactivity

27       The government next argues that, under Teague v. Lane, 489  
28 U.S. 288 (1989), Johnson does not apply retroactively to cases in

1 which an enhancement based on the definition of crime of violence  
2 in the Career Offender Guideline was applied. In Teague, the  
3 Supreme Court held that newly announced constitutional rules apply  
4 to all criminal cases still on direct review but only apply  
5 retroactively on collateral review if the rule (1) "places certain  
6 kinds of primary, private individual conduct beyond the power of  
7 the criminal law-making authority to proscribe" or (2) is a  
8 "watershed rule[] of criminal procedure." Id. at 304, 311  
9 (internal quotation marks omitted).

10 As stated above, the Supreme Court has held that Johnson is a  
11 new substantive rule because it "changed the substantive reach of  
12 the Armed Career Criminal Act, altering 'the range of conduct or  
13 the class of persons that the [Act] punishes.'" Welch, 136 S. Ct.  
14 at 1265 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).  
15 Movant argues that, because the decision in Johnson similarly  
16 limits the application of certain Guidelines provisions and  
17 because it has been found to be retroactive with respect to the  
18 ACCA, it should be retroactive as to those Guidelines provisions  
19 as well. Movant contends that the retroactivity analysis in Welch  
20 applies to the rule set out in Johnson, and does not depend on the  
21 type of case in which the rule is applied.

22 It is true that the rule announced in Johnson applies only by  
23 analogy to the definition of crime of violence in the Career  
24 Offender Guideline. Johnson found that the language in the ACCA  
25 is unconstitutionally vague. While courts, including the Supreme  
26 Court and the Ninth Circuit, routinely look to interpretation of  
27 language in the ACCA when considering nearly identical language in  
28 the Guidelines and vice versa, it cannot be assumed that a finding

1 that Johnson is retroactive as to the ACCA definitively means that  
2 it is retroactive as to the Guidelines. Indeed, the Supreme Court  
3 recently granted certiorari in Beckles v. United States, 2016 U.S.  
4 LEXIS 4142. Among the issues presented in Beckles is whether  
5 Johnson applies retroactively to collateral challenges to federal  
6 sentences enhanced based on the definition of crime of violence in  
7 the Career Offender Guideline.

8 As the government points out, those who meet the criteria of  
9 the ACCA are subject to a statutory mandatory minimum sentence.  
10 In contrast, those who are eligible for enhancements under the  
11 Sentencing Guidelines pursuant to language similar to that found  
12 unconstitutional in Johnson are subject to higher advisory  
13 Guidelines ranges. Therefore, the government argues that, as  
14 applied to defendants who are challenging Guidelines enhancements,  
15 the rule in Johnson is procedural because it "does not alter the  
16 statutory sentencing range or prevent reimposition of the same  
17 sentence without the career offender enhancement." Docket No. 55  
18 at 10. In effect, the government argues that any new  
19 constitutional rules applicable to Guidelines calculations are  
20 neither substantive nor watershed procedural rules under Teague  
21 and thus cannot be applied retroactively.<sup>2</sup> As a district court in  
22 the District of Oregon recently observed, there is no Ninth  
23  
24

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25 <sup>2</sup> The government also argues that any Guidelines calculation  
error is a "procedural error" rather than "substantive error."  
26 However, the terms "procedural error" and "substantive error" are  
27 terms of art related to direct appellate review of sentences and  
28 are not applicable here. See Gall v. United States, 522 U.S. 38,  
51 (2007).

1 Circuit or Supreme Court authority to support this position. See  
2 United States v. Dean, 2016 WL 1060229, at \*13 (D. Or.).

3 Indeed, in Reina-Rodriguez v. United States, the Ninth  
4 Circuit determined that an en banc decision which "altered the  
5 conduct that substantively qualifies as burglary under the  
6 categorical approach" for purposes of the ACCA was a substantive  
7 rule and therefore eligible for retroactive application under  
8 Teague. 655 F.3d 1182, 1189 (9th Cir. 2011). Without addressing  
9 whether the retroactivity analysis should be different for cases  
10 under the Guidelines as opposed to under the ACCA, the Ninth  
11 Circuit applied the decision retroactively to a case challenging a  
12 Guidelines enhancement based on the § 4B1.2 definition of crime of  
13 violence. Id. at 1189-90.

14 Moreover, in Welch, the Supreme Court made clear that it  
15 "determine[s] whether a new rule is substantive or procedural by  
16 considering the function of the rule." 136 S. Ct. at 1265. The  
17 Welch Court held that rule in Johnson was substantive because it  
18 "affected the reach of the underlying statute rather than the  
19 judicial procedures by which the statute is applied." Id.  
20 Applying Johnson to the Guidelines likewise affects the reach of  
21 those Guidelines that rely on the definition of crime of violence  
22 in the Career Offender Guideline but "has nothing to do with the  
23 range of permissible methods a court might use to determine"  
24 whether those Guidelines apply. Id. As it does for the ACCA,  
25 "Johnson substantively changes the conduct by which federal courts  
26 may enhance the sentence of a defendant under the Guidelines."  
27 Dean, 2016 WL 1060229, at \*16. Accordingly, Johnson applies  
28 retroactively to Movant's case.

## 1 III. Crime of Violence

2 Finally, the government argues that Movant's conviction for  
3 second-degree robbery, in violation of California Penal Code  
4 section 211, qualifies as a crime of violence, as defined by the  
5 Career Offender Guideline, without relying on the residual clause.

6 Section 4B1.2 defines a crime of violence as

7 any offense under federal or state law, punishable by  
8 imprisonment for a term exceeding one year, that--

9 (1) has as an element the use, attempted use, or  
10 threatened use of physical force against the person of  
another, or

11 (2) is burglary of a dwelling, arson, or extortion,  
12 involves use of explosives, or otherwise involves  
conduct that presents a serious potential risk of  
physical injury to another.

13 USSG § 4B1.2(a). The underlined portion of the definition is  
14 referred to as the residual clause. Application Note 1 to § 4B1.2  
15 indicates that the term "crime of violence" "includes murder,  
16 manslaughter, kidnapping, aggravated assault, forcible sex  
17 offenses, robbery, arson, extortion, extortionate extension of  
18 credit, and burglary of a dwelling." USSG § 4B1.2, comment.  
19 (n.1).

20 As the government points out, the Ninth Circuit has  
21 previously held that violations of California Penal Code section  
22 211 are crimes of violence for purposes of USSG § 2L1.2. See  
23 United States v. Flores-Mejia, 687 F.3d 1213, 1215-16 (9th Cir.  
24 2012); United States v. Becerril-Lopez, 541 F.3d 881, 892-93 (9th  
25 Cir. 2008). In those cases, the Ninth Circuit held, "CPC § 211 is  
26 categorically a 'crime of violence' under U.S.S.G. § 2L1.2,  
27 because, in all its applications, CPC § 211 always constitutes  
28

1 either generic robbery or generic extortion, both of which are  
2 included in U.S.S.G. § 2L1.2's definition of 'crime of violence.'" "United States v. Dixon, 805 F.3d 1193, 1196 (9th Cir. 2015).

4 Unlike § 4B1.2, § 2L1.2 does not contain a residual clause,  
5 nor does the Guideline itself include a definition of crime of  
6 violence. Instead, an application note to the Guideline defines  
7 crime of violence to be any of a list of enumerated generic  
8 offenses, including robbery and extortion, or any offense that  
9 "has as an element the use, attempted use, or threatened use of  
10 physical force against the person of another." USSG § 2L1.2,  
11 comment. (n.1(b)(iii)).

12 As noted above, the § 4B1.2 Guideline definition of crime of  
13 violence at issue in this case includes extortion, but not  
14 robbery, in its list of enumerated generic crimes. The commentary  
15 to § 4B1.2 includes robbery in an additional list of enumerated  
16 generic crimes. Citing Stinson v. United States, 508 U.S. 36, 38  
17 (1993), the government argues that Guidelines commentary,  
18 including the list of enumerated generic crimes in the commentary  
19 to § 4B1.2, is binding on this Court. Movant counters that  
20 Guidelines commentary is not binding if "it violates the  
21 Constitution or a federal statute, or is inconsistent with, or a  
22 plainly erroneous reading of, that guideline." Id. Movant  
23 further contends that, without the residual clause, generic  
24 robbery no longer constitutes a crime of violence under § 4B1.2.  
25 Therefore, according to Movant, the commentary including robbery  
26 either violates the Constitution because it relies on the residual  
27 clause or is inconsistent with the Guideline without the residual  
28 clause. However, in the Ninth Circuit, generic robbery is defined

1 as "aggravated larceny, containing at least the elements of  
2 misappropriation of property under circumstances involving  
3 immediate danger to the person." United States v. Becerril-Lopez,  
4 541 F.3d 881, 891 (9th Cir. 2008) (quoting 3 W. LaFave,  
5 Substantive Criminal Law § 20.3(e) (2d ed. 2003)). This  
6 definition meets the "elements clause" of § 4B1.2(a), because it  
7 "has as an element the . . . threatened use of physical force  
8 against the person of another." USSG § 4B1.2(a); see also, id.  
9 (noting that the generic definition of robbery requires that the  
10 taking be done by means of violence or the use of force or fear).  
11 Accordingly, the inclusion of robbery in the Guidelines commentary  
12 is binding on this Court.<sup>3</sup>

13 Because § 4B1.2's definition of crime of violence encompasses  
14 both generic robbery and generic extortion and because the Ninth  
15 Circuit has held that California Penal Code section 211 always  
16 constitutes either generic robbery or generic extortion, Movant's  
17 conviction under section 211 continues to qualify as a crime of  
18 violence following Johnson.

19 IV. Request for a Certificate of Appealability

20 If the Court denies Movant's § 2255 motion as it does here,  
21 Movant requests a certificate of appealability (COA) pursuant to

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22         <sup>3</sup> Movant's citation to United States v. Soto-Rivera, 811 F.3d  
23 53 (1st Cir. 2016), is unavailing. In Soto-Rivera, the First  
24 Circuit held that, after Johnson, the inclusion of possession of a  
25 machine gun as a crime of violence in the commentary to § 4B1.2(a)  
26 was improper because, "in the absence of the residual clause,  
27 there is nothing within § 4B1.2(a)'s text to serve as an anchor  
28 for Application Note 1's inclusion of possession of a machinegun  
within the definition of crime of violence." Id. at 60. In  
contrast, as discussed above, generic robbery qualifies as a crime  
of violence under the "elements clause."

1 28 U.S.C. § 2253(c). A certificate of appealability should be  
2 granted "only if the applicant has made a substantial showing of  
3 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).<sup>4</sup>  
4 The Court certifies in accordance with 28 U.S.C. § 2253 that, for  
5 the reasons set forth in the Order Denying § 2255 Motion, none of  
6 the issues raised in the motion involves a substantial showing of  
7 the denial of a constitutional right. The certificate of  
8 appealability is denied.

9 CONCLUSION

10 For the foregoing reasons, the Court DENIES Movant's § 2255  
11 motion. Docket No. 27.

12  
13 IT IS SO ORDERED.

14   
15 Dated: August 2, 2016

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16 CLAUDIA WILKEN  
United States District Judge

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24 <sup>4</sup> Section 2253(c)(2) codified the standard announced by the  
25 United States Supreme Court in Barefoot v. Estelle, 463 U.S. 880,  
26 892-93 (1983). In Barefoot, the Court explained that "a  
substantial showing of the denial of [a] federal right" means that  
a petitioner "must demonstrate that the issues are debatable among  
jurists of reason; that a court could resolve the issues [in a  
different manner], or that the questions are adequate to deserve  
encouragement to proceed further." Id. at 893 n.4.